IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-688

RALPH H. LITTLEJOHN, JR., *Petitioner*,

v.

SHELL OIL COMPANY, SOONER OIL COMPANY AND AMERICAN OIL COMPANY, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## BRIEF FOR RESPONDENTS IN OPPOSITION


WILLIAM SIMON
JOHN S. KENDALL
1270 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
*Attorneys for Respondent*
SHELL OIL COMPANY

CHARLES H. GUTTERY
Colorado National Bank Building
Post Office Box 87
Denver, Colorado 80201
*Attorney for Respondent*
SOONER OIL COMPANY

MAURICE J. MAHER
300 First Republic Bank
Dallas, Texas 75201
*Attorney for Respondent*
AMERICAN OIL COMPANY

## INDEX


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| QUESTIONS PRESENTED | 1 |
| STATUTE INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| ARGUMENT | |
| The En Banc Decision Was Correct and Presents No Important Federal Question or Direct Conflict of Decisions | 6 |
| CONCLUSION | 15 |


## CITATIONS

CASES:


*Abramson* v. *Colonial Oil Co.*, 390 F.2d 873 (5th Cir.), *cert. denied*, 393 U.S. 831 (1968) ..... 11

*Baldwin Hills Building Material Co.* v. *Fibreboard Paper Products Corp.*, 283 F.Supp. 202 (C.D. Cal. 1968) ..... 11

*Bargain Car Wash, Inc.* v. *Standard Oil Co.*, 466 F.2d 1163 (7th Cir. 1972) ..... 14

*Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972) ..... 7, 10, 11

*Borden Co.* v. *FTC*, 339 F.2d 953 (7th Cir. 1964), *rev'd on other grounds*, 383 U.S. 637 (1966) ..... 11

*Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) ..... 15

*Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 287 F.2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961) ..... 11

Page

*Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969) ..... 9

*Copp Paving Co.* v. *Gulf Oil Corp.*, 1973-2 Trade Cas. ¶ 74,732 (9th Cir. 1973) ..... 13

*Country Maid, Inc.* v. *Haseotes*, 324 F.Supp. 875 (E.D. Pa. 1971) ..... 11

*Cream Crest-Blanding Dairies, Inc.* v. *National Dairy Products Corp.*, 370 F.2d 332 (6th Cir.), *cert. denied*, 387 U.S. 930 (1967) ..... 11

*FTC* v. *Bunte Brothers*, 312 U.S. 349 (1941) ..... 8

*Flotken's West, Inc.* v. *National Food Stores, Inc.*, 312 F.Supp. 136 (E.D. Mo. 1970) ..... 11

*Food Basket, Inc.* v. *Albertson's, Inc.*, 383 F.2d 785 (10th Cir. 1967) ..... 11, 12

*Foremost Dairies, Inc.* v. *FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965) ..... 11

*Hamilton-Brown Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251 (1915) ..... 15

*Hiram Walker, Inc.* v. *A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969) ..... 11

*Ingram* v. *Phillips Petroleum Co.*, 259 F.Supp. 176 (D. N.M. 1966) ..... 11

*Izumi* v. *Shell Oil Co.*, 1973 Trade Cas. ¶ 74,274 (N.D. Cal. 1972) ..... 11

*Jones* v. *Metzger Dairies, Inc.*, 334 F.2d 919 (5th Cir. 1964), *cert. denied*, 379 U.S. 965 (1965) ..... 11

*Kastigar* v. *United States*, 406 U.S. 441 (1972) ..... 9

*Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972) ..... 10

*Liquilux Gas Services, Inc.* v. *Tropical Gas Co.*, 303 F.Supp. 414 (D.P.R. 1969) ..... 11

*Littlejohn* v. *Shell Oil Co.*, 326 F.Supp. 45 (N.D. Tex. 1971), *rev'd*, 456 F.2d 225 (5th Cir. 1972), *petition for rehearing en banc granted*, 470 F.2d 997 (5th Cir.), *aff'd in part, vacated in part & remanded en banc*, 483 F.2d 1140 (5th Cir. 1973) ..... 1, *Passim*

*Mayer Paving & Asphalt Co.* v. *General Dynamics Corp.*, 1973-2 Trade Cas. ¶ 74,719 (7th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3257 (U.S. Oct. 19, 1973) (No. 73-671) ..... 10, 12

Page

*Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954), *rehearing denied*, 348 U.S. 932 (1955) .. 8, 9, 10, 11, 12

*Walker Oil Co.* v. *Hudson Oil Co.*, 414 F.2d 588 (5th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970) .... 11

*Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934, *rehearing denied*, 375 U.S. 871 (1963) ..... 11

STATUTES:

Clayton Act

Section 1, 15 U.S.C. § 12 ..... 7

Section 2(a), as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) ..... 1, *Passim*

RULES:

Federal Rules of Civil Procedure

Rule 56(e) ..... 4

Rule 56(f) ..... 4

MISCELLANEOUS:

86 Harv. L. Rev. 765 (1973) ..... 8

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-688

RALPH H. LITTLEJOHN, JR., *Petitioner,*

v.

SHELL OIL COMPANY, SOONER OIL COMPANY AND AMERICAN OIL COMPANY, *Respondents.*

**On Petition for WRIT of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF FOR RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The citations to the opinions below are adequately set forth in the Petition (Pet. 2). The en banc opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. D) is now reported at 483 F.2d 1140.

### JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition (Pet. 2).

### QUESTIONS PRESENTED

Whether the en banc decision below remanding this matter to the trial court for petitioner to file an amended complaint and engage in discovery of basic jurisdictional facts correctly held that the jurisdictional language of Section

2(a) of the Clayton Act[1] expressly requiring that at least one of the two sales complained of as constituting a price discrimination must be in interstate commerce cannot be disregarded; and that federal jurisdiction cannot be assumed merely because a complaint alleges that a price discrimination was subsidized by interstate profits from sales unrelated to the local intrastate price discrimination which plaintiff alleges caused him injury.

Whether a non-final order remanding this case to the district court for discovery of basic jurisdictional facts involving a legal question upon which there is no direct conflict of decisions and upon which this Court has consistently denied certiorari warrants review by this Court.

## STATUTE INVOLVED

Section 2(a) of the Clayton Act (15 U.S.C. § 13(a)), as amended by the Robinson-Patman Act, provides, in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them[.]

## STATEMENT OF THE CASE

This is a private antitrust action involving alleged violations of the Robinson-Patman Act. Petitioner operated a private brand retail service station in Garland, Texas, a

[1] 15 U.S.C. § 13(a), hereinafter sometimes referred to as "Section 2(a)" or "Robinson-Patman Act."

suburb of Dallas, Texas. The complaint alleged that respondents each sold gasoline to a single Shell Oil Company ("Shell") and a single American Oil Company ("American") gasoline station in Garland, Texas, within one-half block of petitioner's station at wholesale prices lower than the prices they charged all other Shell and American retail service stations in the Northeast Dallas, Texas, area. The complaint also alleged that respondents each sold gasoline at one service station in Garland, Texas, one-half block from petitioner's station, at retail prices lower than were charged at other retail service stations in the Garland, Dallas County, Texas, area. [2]

Petitioner began operating his retail service station in September of 1969, and filed the present lawsuit in September of 1970 (R. 1, 26). The amended complaint alleged with precision the net profit petitioner made during the year he operated the station:

> . . . [T]he operation of said service station at 410 S. Plano Road was very successful to Plaintiff; at said location he realized a profit beginning the first full month of operation and continued to make a profit each and every month thereafter through the month of August, 1970; during said first year's operation Plaintiff realized a net profit of $11,257.41 from his station at 410 S. Plano Road. (R. 26).

Nothing in this record supports the statement in the Petition that actions by respondents made petitioner a "bankrupt" or that his business was "destroyed." (Pet 5).

Respondents' answers to the original complaint challenged subject matter jurisdiction on the ground that none of the sales transactions complained of as constituting price discrimination was in interstate commerce as required by

---

[2] The Petition refers to respondents' "controlled" service stations adjacent to petitioner's station (Pet. 5, 6). The amended complaint contains no allegation that those stations were "controlled" by respondents. The trial court specifically held that petitioner had failed to show that respondents controlled the retail prices at the two stations within one-half block of petitioner's station (Pet. App. A at 21).

Section 2(a). The district court granted petitioner leave to file an amended complaint which alleged with greater particularity that the precise sales complained of by petitioner, both the higher price and the lower price said to constitute the discrimination, were sales of gasoline to retail service stations in Northeast Dallas, Texas, near and adjacent to the City of Garland, Texas, where petitioner's station was located (R. 27-29). The amended complaint contained no allegation that the gasoline delivered to the Shell and American stations in the Northeast Dallas area had moved in interstate commerce or that at least one of the sales complained of was in interstate commerce. Petitioner did allege that profits of Shell and American, derived from their interstate operations unrelated to the sales in this action, were used by each of them to support lower priced sales of gasoline to the two stations near petitioner (R. 29-30).

Respondents filed motions for summary judgment to dismiss the action for failure to satisfy the "in commerce" requirement of Section 2(a). Respondent Shell submitted affidavits establishing that all gasoline involved in the sales complained of as to Shell had been refined, transported, stored and delivered wholly within the State of Texas (R. 44-45).[3] Affidavits submitted by respondents American and Sooner Oil Company ("Sooner") demonstrated that all gasoline involved in the sales complained of as to those respondents was acquired by American in Dallas, Texas, and sold by American to Sooner in Dallas, Texas. Sooner, as American's wholesale distributor, sold the gasoline to retail service stations wholly within the State of Texas (R. 37, 39). No affidavits were submitted by petitioner in opposition to respondents' motion for summary judgment, as required by Rules 56(e) and 56(f) of the Federal Rules of Civil Procedure. Petitioner's memo-

[3] The Petition contains the phrase "Although the gasoline was produced or refined elsewhere, and always predestined for the Dallas market . . . ." (Pet. 10). There is nothing in the record to support the inference that the gasoline involved in the sales transactions complained of was refined outside the State of Texas and transported into Texas across state lines (*See* R. 44-45).

randum opposing the summary judgment motions requested that judgment be deferred until petitioner was able to engage in discovery of basic jurisdictional facts. However, petitioner's counsel agreed by letter that no discovery would proceed until after the court's rulings on the pending motions for summary judgment had been resolved (Pet. App. D at 56-58).

The district court granted respondents' motions for summary judgment (Pet. App. A at 17-22). The court noted the absence of any allegation that any gasoline sold by Shell or American to retail stations in the Northeast Dallas area crossed state lines and held that the allegation of interstate underwriting of the local intrastate sales did not satisfy the "in commerce" language of Section 2(a) (Pet. App. A at 19-20).

Petitioner appealed to the Fifth Circuit to review whether the district court erred in granting summary judgment while petitioner's discovery of jurisdictional facts was pending and incomplete. His prayer for relief was as follows:

> Based on the foregoing, Littlejohn prays that his right to conduct discovery in order to meet his burden of proof be vindicated, and that the judgment of the District Court be reversed.[4]

The Fifth Circuit, with Judge Coleman dissenting, reversed the district court stating:

> We simply hold that the district court acted prematurely in foreclosing the plaintiff from further discovery regarding the interstate aspects of the defendants' operations, from the only meaningful source of such discovery, the defendants' records. (Pet. App. B at 32).

The majority also ruled that petitioner's amended complaint conferred jurisdiction on the district court because the complaint alleged that the local intrastate sales were

---

[4] Petitioner's opening brief on appeal to the Fifth Circuit Court of Appeals at 30.

subsidized by profits from interstate activities (Pet. App. B at 31).

Respondents filed a petition for rehearing en banc on the ground that unless one of the two sales alleged to constitute the discrimination was in interstate commerce there is no federal jurisdiction under Section 2(a). A rehearing en banc was ordered, and the parties were permitted to brief fully the jurisdictional issue. The rehearing carefully reviewed the record and considered all factual and legal contentions of the petitioner.

The en banc opinion affirmed the ruling of the district court that it was without subject matter jurisdiction under Section 2(a). The statutory requirement that at least one of the sales involved in the alleged discrimination must have been in interstate commerce was considered by the en banc panel to be "the sine qua non of subject matter jurisdiction" in a Section 2(a) action (Pet. App. D at 49). The en banc opinion agreed with petitioner that the discovery proceedings were "truncated, albeit inadvertently" by the judgments of dismissal (Pet. App. D at 44). The summary judgments dismissing the action were vacated, and the matter was remanded to the trial court with directions that petitioner amend his complaint to allege specifically that at least one of the sales in question with respect to each respondent was in interstate commerce. The en banc opinion further directed that petitioner be permitted to engage in discovery to prove that jurisdictional allegation (Pet. App. D at 54).

## ARGUMENT

### The En Banc Decision Was Correct and Presents No Important Federal Question or Direct Conflict of Decisions

The Petition contains the identical arguments which petitioner presented and lost in the en banc rehearing in the Court of Appeals. The en banc decision was consistent with all applicable precedents of this Court and lower courts, all of which have uniformly upheld the express statutory language of Section 2(a). This Court has con-

sistently denied certiorari in every case which has held that a sale across a state line is a prerequisite for an action invoking federal jurisdiction solely upon that antitrust statute. As recently as last year in *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972), this Court denied certiorari from a final judgment, after trial, that dismissed a Robinson-Patman price discrimination claim involving allegedly discriminatory intrastate gasoline sales confined to the Salt Lake City, Utah, area. The Court of Appeals held that the district court lacked jurisdiction over the Robinson-Patman claim where none of the sales complained of as constituting the price discrimination was in interstate commerce. The wholly intrastate character of the sales complained of in *Belliston* v. *Texaco, Inc.*, is indistinguishable from that alleged in the present case. *Littlejohn*, like *Belliston*, presents no substantial or important federal question. The considerations against granting certiorari in the present case are even more compelling than those presented in *Belliston* because in the instant case the Fifth Circuit has entered a non-final interlocutory order remanding the case to the trial court for further proceedings.

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, is a unique antitrust statute in that it contains three separate requirements as to "commerce"[5] which place precise limitations upon a federal court's jurisdiction. The jurisdictional requisites of a Section 2(a) action are clearly set forth in the words of the statute:

> It shall be unlawful for any person [1] engaged in commerce, [2] in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, [3] *where either or any of the purchases involved in such discrimination are in commerce.* . . . (15 U.S.C. § 13(a)) (Emphasis added).

---

[5] "Commerce" is defined as interstate and foreign commerce. *See* Section 1 of the Clayton Act (15 U.S.C. § 12).

Courts have consistently held that the plain statutory language means precisely what it says. The first requirement relates to businesses engaged in interstate commerce, the second to the "course" of commerce, and the third requires at least one of the allegedly discriminatory sales to be *in* interstate commerce. Since each of the three requirements must be satisfied, failure to allege that one of the discriminatory sales is in interstate commerce is dispositive of the issue of subject matter jurisdiction.

The Fifth Circuit, en banc, correctly held that subject matter jurisdiction in an action brought under a federal statute stands or falls upon whether the complaint alleges the jurisdictional requisites of that statute. The en banc opinion adhered to the literal language of the statute and refused to consider the third jurisdictional element superfluous. In so doing, the Fifth Circuit followed canons of statutory interpretation generally applied by this Court. *See FTC* v. *Bunte Brothers*, 312 U.S. 349 (1941). In contrast, the statutory construction urged by the Petition would excise the express mandate of a sale "in commerce" and subvert the clear meaning of the words of the statute.[6]

The controlling principle of the threefold Section 2(a) jurisdictional test is that the "in commerce" language requires a Robinson-Patman Act complaint to allege that at least one of the two sales complained of as constituting price discrimination crossed a state line. That principle was enunciated in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 118 (1954), *rehearing denied*, 348 U.S. 932 (1955):

> Respondent is engaged in commerce, selling bread both locally and interstate. In the course of such business, it made price discriminations, maintaining the price in the *interstate* transactions and cutting the price in the *intrastate* sales. (Emphasis original).

This Court did not deviate from the jurisdictional language of Section 2(a) in *Moore* v. *Mead's Fine Bread Co.* This Court did not hold that a plaintiff seeking to invoke federal

---

[6] *See* 86 Harv. L. Rev. 765 (1973).

jurisdiction in a Section 2(a) price discrimination action need not allege a sale "in commerce" to satisfy the statute's jurisdictional requirements.

The facts in *Moore* v. *Mead's Fine Bread Co.* met each of the three jurisdictional requirements of Section 2(a). The first two "commerce" requirements were satisfied by the fact that the sales prices in interstate commerce at Farwell, Texas, were maintained while the prices in intrastate sales to Santa Rosa, New Mexico, were drastically cut (*Ibid.* at 118). The third jurisdictional element, the "in commerce" requirement, was met when the Court recognized that one of the sales complained of as constituting price discrimination did in fact cross a state line and was, therefore, in interstate commerce:

> Respondent sells bread in Farwell, Texas, a town which it serves with a bread truck operating out of Clovis, New Mexico. (*Ibid.* at 116).

As pointed out by this Court, the facts in *Moore* v. *Mead's Fine Bread Co.* did indeed "read upon the words of the statute." (*Ibid.* at 120).

Since *Moore* v. *Mead's Fine Bread Co.*, the rule that a Section 2(a) action must allege that one of the two sales complained of as constituting price discrimination crossed a state line has been uniformly applied by the lower courts. The argument that language in *Moore* v. *Mead's Fine Bread Co.* supports jurisdiction in a Section 2(a) action if the price cutting is financed by profits from multistate operations has been consistently rejected as being dicta to the Section 2(a) jurisdictional issue.[7] For example, in *Cliff*

---

[7] Words entirely unnecessary for the decision of the case are considered obiter dictum. As stated by this Court in *Kastigar* v. *United States*, 406 U.S. 441, 454-455 (1972):

> The broad language in *Counselman* relied upon by petitioners was unnecessary to the Court's decision, and cannot be considered binding authority.

*Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203, 209 (5th Cir. 1969), the court stated:

> There is language in the *Mead's Fine Bread* case that may be read as supporting appellant's argument. Mr. Justice Douglas was concerned about large interstate enterprises waging local price wars with war chests filled with interstate booty. In *Mead's*, however, one of the discriminatory sales, the profits from which subsidized the local price-cutting campaign, was 'in commerce' within the meaning of the Act. . . . *And since* Mead's Fine Bread, *the critical language in the statute has been repeatedly construed to mean that the seller must not only be engaged in interstate commerce, but that one of the discriminatory sales must be in interstate commerce.* (Emphasis added; citations omitted).

The decision in *Moore* v. *Mead's Fine Bread Co.* was analyzed anew in the Fifth Circuit's en banc opinion below. The Court of Appeals carefully noted that the third jurisdictional element, the critical "in commerce" requirement, was satisfied in that case, and provided the following perspective:

> *Moore* v. *Mead's Fine Bread* is a landmark case in that it explicated the coverage of § 2(a) to protect the competitor of a purchaser who purchased from one seeking to destroy the competitor by price cutting. *The case did not, however, alter or extend the specific jurisdictional requirements of § 2(a).* (Emphasis added) (Pet. App. D at 50).

Lower court decisions analyzing Section 2(a) have consistently required that the "in commerce" requirement be satisfied to confer federal jurisdiction. The cases need not be discussed individually. A footnote citation suffices to demonstrate the uniformity of lower court decisions on this question.[8]

---

[8] *See Mayer Paving & Asphalt Co.* v. *General Dynamics Corp.*, 1973-2 Trade Cas. ¶ 74,719 (7th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3257 (U.S. Oct. 19, 1973) (No. 73-671); *Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972); *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert.*

This Court has denied certiorari in each of the eight petitions presented after *Moore* v. *Mead's Fine Bread Co.* in cases where lower courts have held that the express "in commerce" language in Section 2(a) means that at least one of the sales complained of as constituting the alleged price discrimination must have crossed a state line. *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972); *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934, *rehearing denied*, 375 U.S. 871 (1963); *Jones* v. *Metzger Dairies, Inc.*, 334 F.2d 919 (5th Cir. 1964), *cert. denied*, 379 U.S. 965 (1965); *Foremost Dairies, Inc.* v. *FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965); *Cream Crest-Blanding Dairies, Inc.* v. *National Dairy Products Corp.*, 370 F.2d 332 (6th Cir.), *cert. denied*, 387 U.S. 930 (1967); *Abramson* v. *Colonial Oil Co.*, 390 F.2d 873 (5th Cir.), *cert. denied*, 393 U.S. 831 (1968); *Hiram Walker, Inc.* v. *A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969); *Walker Oil Co.* v. *Hudson Oil Co.*, 414 F.2d 588 (5th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970).

---

*denied*, 408 U.S. 928 (1972); *Walker Oil Co.* v. *Hudson Oil Co.*, 414 F.2d 588 (5th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970); *Hiram Walker, Inc.* v *A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969); *Abramson* v. *Colonial Oil Co.*, 390 F.2d 873 (5th Cir.), *cert. denied*, 393 U.S. 831 (1968); *Food Basket, Inc.* v. *Albertson's, Inc.*, 383 F.2d 785 (10th Cir. 1967); *Cream Crest-Blanding Dairies, Inc.* v. *National Dairy Products Corp.*, 370 F.2d 332 (6th Cir.), *cert. denied*, 387 U.S. 930 (1967); *Foremost Dairies, Inc.* v. *FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965); *Borden Co.* v. *FTC*, 339 F.2d 953 (7th Cir. 1964), *rev'd on other grounds*, 383 U.S. 637 (1966); *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934, *rehearing denied*, 375 U.S. 871 (1963); *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 287 F.2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961); *Izumi* v. *Shell Oil Co.*, 1973 Trade Cas. ¶ 74,274 (N.D. Cal. 1972); *Country Maid, Inc.* v. *Hascotes*, 324 F.Supp. 875 (E.D. Pa. 1971); *Flotken's West, Inc.* v. *National Food Stores, Inc.*, 312 F.Supp. 136 (E.D. Mo. 1970); *Liquilux Gas Services, Inc.* v. *Tropical Gas Co.*, 303 F.Supp. 414 (D.P.R. 1969); *Baldwin Hills Building Material Co.* v. *Fibreboard Paper Products Corp.*, 283 F.Supp. 202 (C.D. Cal. 1968); *Ingram* v. *Phillips Petroleum Co.*, 259 F. Supp. 176 (D.N.M. 1966).

The repeated denials of certiorari in cases where *Moore* v. *Mead's Fine Bread Co.* has been confined to its Section 2(a) jurisdictional facts led the Tenth Circuit (the court from which the *Moore* appeal was taken) to state in *Food Basket, Inc.* v. *Albertson's, Inc.*, 383 F.2d 785, 787 (10th Cir. 1967):

> It seems safe to assume that if the post-Meade [sic] Bread case law is contrary to the language used there, the Supreme Court would have corrected the misinterpretation on repeated applications for certiorari. We take the statute to mean what it says, i.e., that at least one of the discriminatory sales complained of must be in commerce.

Petitions for certiorari on this same issue have been filed in five of the last six years, each one having been denied. The instant petition is yet another attempt to have this Court review a decision that presents no special or important federal questions and upon which the lower courts have been consistent in following the language of the statute and the jurisdictional facts in *Moore* v. *Mead's Fine Bread Co.*

The Supplement to Petition for writ of certiorari incorrectly argues that recent circuit decisions are in direct conflict with the en banc opinion below. In *Mayer Paving & Asphalt Co.* v. *General Dynamics Corp.*, 1973-2 Trade Cas. ¶ 74,719 (7th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3257 (U.S. Oct. 19, 1973) (No. 73-671), the majority stated that the "in commerce" jurisdictional language of Section 2(a) requires that one of the sales complained of as constituting price discrimination must cross a state line. (1973-2 Trade Cas. at 95,160 - 95,161). In that case there was an allegation of interstate sales by defendant from Illinois into Indiana at prices lower than the intrastate sales in Illinois (*Id.*). The court carefully noted that its decision was wholly consistent with the en banc opinion in the instant case, stating in a footnote to a citation to the original panel's opinion in *Littlejohn:*

> Subsequent to the time that the drafting of this opinion was completed and the opinion had been circulated, this court learned that the Fifth Circuit, *en*

*banc*, had vacated the earlier panel opinion insofar as it indicated a lack of necessity for at least one discriminatory interstate sale. 42 U.S.L.W. 2114 (August 10, 1973). In the present opinion, we had found *Littlejohn* as originally written not dispositive. The superseding *en banc* opinion, of course, strengthens the result reached by the opinion in the present case before this court. Since we have reached the result we did irrespective of the original *Littlejohn* opinion, we have not deemed it necessary to revise the references in our opinion to the original opinion nor to refer further to the *en banc* opinion other than noting that it supports the result we have reached. (1973-2 Trade Cas. at 95,162 n. 3a).

Mr. Justice Clark (sitting by designation) dissented on the ground that plaintiff, doing business in Illinois, *did* compete with an Indiana company, although competition "across the border in Indiana" was hindered because of the higher charges extracted from it by defendant (1973-2 Trade Cas. at 95,167). Neither the majority nor the dissenting opinion holds or suggests that the "in commerce" jurisdictional requirement of Section 2(a) should be disregarded.

The decision in *Copp Paving Co.* v. *Gulf Oil Corp.*, 1973-2 Trade Cas. ¶ 74,732 (9th Cir. 1973), does not represent a direct conflict with the en banc opinion in *Littlejohn*. That case involved allegations of violations of a number of antitrust laws, the Sherman, Clayton and Robinson-Patman Acts (15 U.S.C. §§ 1, 2, 13(a), 14 and 18). The Court of Appeals found that the sales of asphalt involved did affect interstate commerce sufficiently to establish Sherman Act jurisdiction and then found that the production of asphalt for use in interstate highways placed the asphalt producers in interstate commerce. The court acknowledged the "state line test" in actions pursuant to Section 2(a) but felt an exception should be made where the particular commodity involved (asphalt) was used in creating the instrumentality of interstate commerce (interstate highway construction). The *Littlejohn* en banc decision was distinguished on its facts. The opinion by the Ninth Circuit Court of Appeals,

even if correct, is unique to the facts of that case, and does not present a direct conflict of decisional law on the "in commerce" jurisdictional requirement of Section 2(a).

Congress has determined that price discriminations involving solely intrastate sales are beyond the scope of the Robinson-Patman Act. Where, however, the product involved in the sales complained of as discriminatory has crossed a state line and thus was "in commerce," the jurisdictional requirements of the Act are satisfied. In *Bargain Car Wash, Inc.* v. *Standard Oil Co.*, 466 F.2d 1163 (7th Cir. 1972), gasoline had been refined in states other than Illinois and later transported into Illinois in the course of the sales complained of as discriminatory. Mr. Justice Clark (sitting by designation) accordingly concluded that the gasoline sales involved were "well within the jurisdictional requirement of the Act." (*Id.* at 1166). Where facts are alleged and proved which establish that either or any of the sales complained of are "in commerce," courts have fully applied the provisions of the Robinson-Patman Act. If a more pervasive commerce coverage is to be fashioned for that Act, the argument should be addressed to Congress, not this Court.

The present Petition seeks a writ of certiorari from a Court of Appeals order which was not a final judgment against this petitioner. The en banc opinion was essentially an order dismissing the amended complaint, not the action, with both leave to amend and the opportunity to engage in discovery of basic jurisdictional facts. A petition for certiorari must present an extraordinary issue of general importance to warrant review of a non-final order. This Court has denied certiorari because of the non-finality of an order remanding the case to the trial court. *See*

*Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251 (1915). In the present case, the Court of Appeals order has given petitioner the opportunity to resolve the very issue that is the subject of this Petition. Petitioner has never contended that he would be unable to establish the requisite sale across state lines. He has always argued for the precise result granted him by the en banc decision—the opportunity to conduct full discovery to uncover basic jurisdictional facts known to respondents.

Piecemeal appeals are not favored by this Court. The preferred procedure is for petitioner to follow the remand instructions from the Court of Appeals and pursue discovery to develop a full factual record on the character of the sales transactions involved in this complaint. Further trial proceedings may well enable petitioner to satisfy the "in commerce" requirement by identifying and proving that one of the sales complained of as constituting price discrimination crossed state lines, thus avoiding Supreme Court review of the issue presented in the instant Petition.

## CONCLUSION

The practice of this Court has been to grant writs of certiorari only in cases involving either principles of fundamental importance to the general public or a direct conflict in circuit court opinions. Respondents respectfully submit that the instant Petition presents no important question of federal law and no conflict of decisions calling for settlement by this Court. The Court of Appeals order dismissing the amended complaint simply measured the complaint allegations against the explicit jurisdictional

language in Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The order remanding the case to the district court grants petitioner the further opportunity to file a second amended complaint and engage in discovery to establish the basic jurisdictional facts required by the explicit language of the statute. The Petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM SIMON
JOHN S. KINGDON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
*Attorneys for Respondent*
SHELL OIL COMPANY

CHARLES H. GULLETT
Citizens National Bank Building
Post Office Box 87
Denison, Texas 75020
*Attorney for Respondent*
SOONER OIL COMPANY

MATTHEW J. GALLO
200 East Randolph Drive
Chicago, Illinois 60601

KHENT H. ROWTON
1000 Empire Life Building
Dallas, Texas 75201
*Attorneys for Respondent*
AMERICAN OIL COMPANY

*Of Counsel:*

HOWREY, SIMON, BAKER
& MURCHISON
Washington, D.C.

Dated: November 21, 1973